



**Murigi alias John Munyua Waweru v Muiruri alias Joseph Muiruri
Tiras Mbogo & another (Environment & Land Case 609 of 2014)
[2015] KEELC 841 (KLR) (19 November 2015) (Judgment)**

John Murigi v Josphat Muiruri & 2 Others [2015] eKLR

Neutral citation: [2015] KEELC 841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 609 OF 2014
L WAITHAKA, J
NOVEMBER 19, 2015
(FORMERLY NAIROBI HCCC NO. 1058 OF 2005 (O.S
IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT**

BETWEEN

JOHN MURIGI ALIAS JOHN MUNYUA WAWERU PLAINTIFF

AND

**JOSEPHAT MUIRURI ALIAS JOSEPH MUIRURI TIRAS
MBOGO 1ST DEFENDANT**

GEORGE NG'ANG'A MBURU 2ND DEFENDANT

JUDGMENT

1. The plaintiff John Murigi, took up the summons dated 9th August, 2005 for determination of the following questions:-
 - 1) Whether he has become entitled to half share of L.R NOS. Loc.11/Muchungucha/2263 and Loc.11/Muchungucha/2264 by adverse possession?
 - 2) Whether the defendants titles to half share of L.R NOS. Loc.11/Muchungucha/2263 and Loc.11/Muchungucha/2264 have by virtue of Section 37 and 38 of the Limitation of Actions Act been extinguished in his favour?
 - 3) Whether the defendants hold half share of L.R NOS. Loc.11/Muchungucha/2263 and Loc.11/Muchungucha/2264 in trust for him?



- 4) Whether the defendants should be ordered to forthwith transfer half share of L.R NOS. Loc.11/Muchungucha/2263 and Loc.11/Muchungucha/2264 to him failing which the Deputy Registrar of this court should be ordered to sign transfer documents to facilitate the transfer of the half share due to him?
 - 5) Who should pay the costs of the suit?
2. The application is supported by the affidavit of the plaintiff sworn on 9th August, 2005. In that affidavit, the plaintiff has deposed that the 1st defendant who is his step father, held the original parcel of the land to wit, LR. NO. Loc 11/Muchungucha/594 (hereinafter referred to as the suit land), in trust for him. He contends that he was born and brought up in the suit land and has effected developments thereon (has built houses and farms thereon).
 3. It is the plaintiff's contention that he has lived in the half share he claims for the last 57 years without interruption hence has acquired title thereto by adverse possession. The plaintiff further contends that in total disregard to his quiet and uninterrupted possession of the suit property, the defendant subdivided the suit land into two parcels and caused one of the subdivisions to wit, LR NO. Loc.11/Muchungucha/2264, to be registered in the name of the 2nd defendant when he knew or ought to have known that his interest therein, to the extent of half share, had been extinguished by his adverse possession thereof.
 4. The plaintiff's claim is opposed through the replying affidavit of the 2nd defendant, George Ng'ang'a Mburu, sworn on 24th October, 2005 in which the 2nd defendant has, inter alia, deposed that a trust presupposes entry and occupation of the suit land was consensual and for that reason, an alleged trust relationship cannot be a basis for entitlement to land by adverse possession; that even assuming that the plaintiff is entitled to claim entitlement to the suit property by adverse possession, time in that respect began to run in July 2004 after he lost his claim to entitlement to the suit property vide Murang'a LDT No. 12 of 2004.
 5. Arguing that claims based on trust and adverse possession are mutually exclusive, the 2nd defendant submits that the plaintiff's claim for adverse possession is unsustainable.
 6. The suit was disposed of by way of written submissions.

Submissions by the plaintiff

7. In the submissions filed on behalf of the plaintiff reference is made to Section 7 of the *Limitation of Actions Act* and the cases of Tayebali Adamji Alibhai vs. Abdulhussein Adamji Alibhai (1938) EACA and Peter Wanyoike Gathure vs. A. Beverly (1965) E.A 514 and submitted that the 1st defendant's cause of action against the plaintiff accrued in 1966 when he got registered as the proprietor of the suit property.

In the case of Peter Wanyoike Gathure vs. A. Beverly (supra) it was held that:-

“no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate.”

8. Based on the averments contained in the plaintiff's supporting affidavit and the witness statement of Mary Njeri Kamande to the effect that the 1st defendant held the suit property in trust for the plaintiff to the extent of half share thereof (1.35 acres), it is submitted that the 1st defendant ought to have exercised or asserted his rights against the plaintiff before the end of 12 years (that is before 1978).



9. It is further submitted that by allowing the plaintiff to continue occupying the suit property beyond the period of time he could have exercised his right against the plaintiff, the plaintiff's occupation thereof became adverse to the title held by the 1st defendant.
10. Concerning the subdivision of the suit land and subsequent transfer of a portion thereof to the 2nd defendant, it is submitted that subdivision and transfer was of no consequence because the original title had already been extinguished by the plaintiff's adverse possession.
11. The plaintiff also relied on the following cases:-
 - a) Mbugua Njuguna v. Elijah Mburu Wanyoike & another; Nairobi Court of Appeal Civil Appeal No. 27 of 2002;
 - b) Githu v. Ndeete (1984)KLR 776;
 - c) Ndatho v. Itumo & others (2002)2 KLR 638
 - d) Wasui v. Musumba (2002)1 KLR 396.

Submissions by the defendant

12. In the submissions filed on behalf of the defendant, it is submitted that since the plaintiff's claim is premised on the existence of an alleged trust relationship between the 1st defendant and himself, the plaintiff cannot succeed in his claim unless he can prove that he was in adverse possession of the suit land before the trust relationship arose.
13. Explaining that the plaintiff had lodged a claim at the defunct Land Disputes Tribunals for determination of the trust that he alleged existed between him and the plaintiff over the suit land, counsel for the defendants' points out that the plaintiff lost that claim.
14. Based on the proceedings of the Land Disputes Tribunal, it is submitted that contrary to the allegation that the plaintiff has been in the suit property since his childhood (for over 57 years), the evidence adduced before the tribunal shows that the plaintiff set foot in the suit property in 2003.
15. Contending that the plaintiff, if at all was in adverse possession of the suit land, had only been in adverse possession of the suit property for three years before the current suit was filed, counsel for the defendants submits that the 1st defendant's title to the suit property had not been extinguished as claimed.

Analysis and determination:

16. It is not in dispute that the parties to this suit are relatives and that the plaintiff was in occupation of the suit property before the current suit was filed. Although the plaintiff has not disclosed that he had lodged a claim at the defunct Land Disputes Tribunal claiming a share of the suit land, the evidence on record shows that sometime in 2004, the plaintiff had lodged a claim against the defendant claiming beneficial interest in the suit land, Loc.11/Muchungucha/2104.
17. Upon considering the claims presented before it, the Tribunal held as follows:-

“BENEFICIAL INTEREST IN LAND NO. LOC.11/MUCHUNGUCHA/2104

1. According to the plaintiff Mr. John Munyua's statement, the land belongs to five brothers.



2. According to the Defendant Mr. Josphat Muiruri the original land Reg. No. Loc. 11/Muchungucha/594 area 0.93 Ha. Was given to his mother Mrs. Peris Wamaitha Tirathi by the clan and the mother registered the land under Josphat Muiruri's name her only son but has three marries sisters.

FACT

1. On certain date Mr. Josphat Muiruri sold a part of his land 0.5 acres above registered and was given a new Reg. No. Loc. 11/Muchungucha/2104. During this transaction Munyua was aware a fact he did not deny and did not put a caution to prevent Josphat from doing it.
2. John Munyua claims that the land belonged to five brothers (their fathers) why his he claiming for his share alone while the children of the other fathers are not demanding their share from Josphat whom Munyua claims demarcated their lands.
3. From the time the lands were demarcated and Mr. Munyua is a mature man (adult) he did not request his share from his father's brother Mr.Kamande nor from Peris Wamaitha the wife to his father's brother Mr. Titathi Mbogo until after she died. Before the death of Peris wamaitha she had summoned Kamande, Munyua and Josphat where she told Munyua it is Kamande's land where he has a share of land and it is where he would erect his house.
4. During dermacation period, Mr. Waweru, Munyua's father was alive, Mr. Kamande Munyua's step father was alive. There was no reason why Peris would dermacate their lands.

CONCLUSION

There was no member of the clan who testified as to where Mr. Waweru-father to John Munyua was exactly buried.

We the sitting panel of elders have come to conclusion that the land in dispute Reg. No.

Loc.11/Muchungucha/2104 belongs to Josphat Muiruri Tirathi and has all the right of the land.

You have thirty (30) clear days to appeal from this date-27th July, 2004.”

18. Although the issue(s) as to whether or not the 1st defendant held the suit land in trust for the plaintiff and/or whether the plaintiff had become entitled to the portion he claims by adverse possession were not raised before the tribunal, I find the testimonies given before the tribunal very relevant in addressing the said issues.
19. I say this because the testimonies given in those proceedings are the only evidence that can assist thiscourt test the truth or otherwise in claims made by the plaintiff. In this regard, the testimony of the plaintiff's wife, Monica Wanjiru Munyua, who testified as plaintiff's witness 5, is instrumental. She stated:-

“I am a wife to the plaintiff aged 33 years. I was married in the year 1991 December and I was taken home. I used to stay in Nairobi where my husband works. When I was taken home I was given a land by Muiruri's mother, Peris Wamaitha and shown where to build a house. I have already constructed a two roomed timber house which I build last year July. Before



I was staying in Peris Wamaitha's house which was constructed by my husband Munyua. I also cultivate the land."

20. The testimony of the plaintiff's wife rhymes well with that of Elizabeth Waitherero who testified as plaintiff's witness No.6 before the Land Disputes Tribunal. She stated:-

"...Before Josphat's mother died on 20th July 2001 she used to stay with Munyua's wife in the mother's house but after the death of mother Munyua elected another house where they stay upto this time."

21. The foregoing testimonies leaves one without a doubt that the plaintiff and his family have lived in the suit land for some time. The evidence on record shows that he was being harboured by the defendant's mother and that the portion he constructed his house on was given by the defendant's mother. From the evidence on record, it is not clear when the defendant's mother gave the plaintiff and his family the portion they live on and the reason for so doing.

22. Trust being a quest of fact that requires to be proved by way of evidence, it behoved the plaintiff to produce evidence capable of proving existence of trust in favour in the title held by the defendants.

23. In the absence of any other evidence to controvert the testimony of the plaintiff's wife before the tribunal to the effect that she used to live in a house belonging to the defendant's mother until the defendant's mother showed her where to build her own, makes it very hard for this court to infer existence of any trust relationship between the plaintiff and the defendant. If anything, the evidence on record shows very little activity by the plaintiff and his family in the suit property before they preferred a claim to the tribunal.

24. In the case of *Salesio M' itonga v. M'ithara & 3 Others* (2015)e KLR the Court of Appeal stated:-

"It is trite law that trust is a question of fact and has to be proved by evidence. In *Gichuki -vs- Gichuki - Civil Appeal No. 21 of 1981*, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust. See also *Mumo -vs- Makau - Civil Appeal No. 56 of 2001*. In this case the appellant claimed that the original parcel belonged to his late father and was ancestral land. He also claimed that the 1st respondent was registered as proprietor and held a portion of 3 acres in trust for him. On the other hand, the 1st respondent refuted the appellant's claim and maintained that the original parcel belonged to him. The trial court made the following findings on the issue of trust:-

"I am persuaded that the 1st defendant (1st respondent) was registered as the owner of the suit land as a trustee for the family. I say so for the following reasons. There is evidence on record to show that the plaintiff (appellant) had one of the parcels of land belonging to his father registered in his name. This means that there was a high possibility that the suit land belonged to the father of the plaintiff and the 1st defendant even though the same was registered in the name of the 1st defendant. Secondly, the plaintiff planted tea bushes on the land without any interference by the 1st defendant. This means that it was common knowledge that the suit land belonged to the family. Thirdly, the 1st defendant was not given any family land. That means it was understood by everybody that he had already benefited by way of the suit land"

Having perused the record and taking into account the evidence therein, we find that the trial court erred in finding that the appellant had proved the existence of a trust. This is because firstly, the burden



was upon the appellant to prove the creation and existence of the alleged trust. The fact that the appellant had one of the parcels of land, Abogeta/U- Kithangari/219 which belonged to their father did not prove the allegation that the original parcel was family land. Secondly, the fact that the appellant had also planted tea bushes thereon did not by itself establish a trust. Thirdly, we are unable to find any justification on record for the trial court's finding that the 1st respondent was not given any family land because he had already benefited by way of the original parcel. The 1st respondent in his evidence clearly indicated that his late father bequeathed both the appellant and himself parcels of land which he owned. This fact was not disputed by the appellant.

18. The appellant testified that the original parcel belonged to his father and was ancestral land. He has lived on the said land from 1969 and his father gave him a portion of 3 acres from the said land in 1988. He also testified that both he and his father were present when the 1st respondent was registered as the proprietor of the original parcel. He further testified that he was the eldest son. Based on the foregoing, we are of the considered view that the appellant did not prove how the alleged trust was created. This is because as correctly pointed out by the 1st respondent in his evidence; the appellant did not give any explanation why the original parcel was registered in the 1st respondent's name yet both his father and himself were present during the registration. Further the appellant in his evidence testified that at the time of registration he had an identification card while the 1st respondent did not. The question that arises is why was the original parcel registered in the 1st respondents name if it was ancestral land? We believe it was imperative for the appellant to have given evidence in this respect in order to prove how the alleged trust was created.
19. PW2, Phantus Magiri, testified that the original parcel belonged to the appellant and 1st respondent's late father and that it was family land. We find that his evidence did not prove the existence of the alleged trust. This is because he admitted in his evidence that he never discussed anything with appellant and 1st respondent's father regarding the parcel. So how did he know that the parcel belonged to the appellant's father and that it was family land? This brings into question the credibility of the said evidence.

The appellant also contended by virtue of the fact that he was in possession of a portion of the original parcel and by dint of Section 116 of the *Evidence Act*; the burden shifted to the respondents to prove that there was no trust. Section 116 provides:-

“When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same. We find that Section 116 of the *Evidence Act* is not applicable in this case.

We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra. In this case, the respondent had to adduce evidence to establish on a balance of probabilities that a trust exists in his favour over the suit property. I did consider the respondent's evidence at length. He did not explain on what basis he believes that a trust existed. All he said is that he did not know why the land was registered in the 1st appellant's name and not his father's name. In fact if one critically analyses the respondent's evidence, it becomes abundantly clear that why he believes that there was a trust in his favour is because in 1982 or 1988 their father gave him a portion of 1st appellant's suit land. Yet he says he has been in occupation since 1969 when he planted tea trees. The



evidence that it was his father who gave to him the land needs substantiation. This is because he was utilizing the land anyway. So what unique thing happened in 1982 or 1988 to signify he was given the land by his father? In any event the respondent admits he knew that the land was registered in the 1st defendants/appellant's name. How could his father give him land which did not belong to him? The respondent's evidence was full of contradictions. It is however clear that he did not adduce any evidence to prove trust to the required standards. Mere utilization of the land is not proof of the existence of a trust. The only conclusion one can reach from this set of facts is that the land was not family land and the 1st appellant was not registered as proprietor on any fiduciary capacity.”

22. Having expressed ourselves as above, we find that the trial court properly exercised its jurisdiction as the first appellate court.”
25. It is clear from the above cited judgment of the court of appeal, that the burden of proving existence of the alleged trust relationship between the plaintiff and the 1st defendant lay with the plaintiff. The evidence given in this case falls short of the standard of evidence required to establish trust relationship in favour of the plaintiff. Like the tribunal, I cannot comprehend why the plaintiff had to wait until the death of the plaintiff's mother to claim his share of the suit property from the plaintiff.
26. On whether the plaintiff has proved entitlement to the suit property by adverse possession, upon considering the evidence on record I make the following observations:-
 - a) That it is not in dispute that the plaintiff's entry into the suit property was consensual;
 - b) That if, at all, the plaintiff's possession of the suit property became adverse to the defendant's title in respect thereof, that only happened after the claim by the plaintiff before the tribunal;
 - c) That time for purposes of adverse possession against the title held by the 2nd defendant only began to run after the 2nd defendant obtained title to the suit property.
27. To establish his entitlement to the suit property, the plaintiff is required to prove that he has been in adverse possession of the suit property for a period of time amounting to twelve years. The evidence adduced in this case shows that the time the plaintiff has been in adverse possession of the suit property, if at all, is from the time the Tribunal dismissed his claim to entitlement to the suit property (on 27th July, 2004). The current suit was filed in 2005, barely a year from the time the Tribunal made its decision concerning the plaintiff's claim. For the foregoing reason(s) I find the plaintiff's claim for adverse possession to be unsustainable.
28. The upshot of the foregoing is that the plaintiff has not made a case for being granted the orders sought. The suit is, consequently, dismissed with costs to the 2nd defendant/respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF NOVEMBER , 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Macharia h/b for Mr. Mwaniki Wairimu for defendant

Mr. Karingithu h/b for Mr. Kirubi for the plaintiff

George Ng'ang'a Mburu – 2nd defendant

Court assistant - Lydia

